

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Butte
(County File No. 011-ACP-BUT-01/02)

Administrative Docket No. 111

DECISION

**PAUL CHERUBINI
4857 Summit View Drive
El Dorado, California 95623**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Butte County Agricultural Commissioner found that the appellant, Paul Cherubini, violated one section of the FAC and two sections of 3 CCR, including 3 CCR section 6618(a)(1). The commissioner imposed a total penalty of \$1,302, including a penalty of \$1,000 for the section 6618(a)(1) violation.

Mr. Cherubini appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation in regard to the section 6618(a)(1) violation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using his independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides them on the record before the Hearing Officer. In reviewing the record, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are in the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the findings and decision, the Director affirms the decision.

3 CCR section 6618(a)(1)

Section 6618(a)(1) provides that each person performing pest control shall give notice to the operator of the property to be treated before any pesticide is applied. The notice shall be in a manner the person can understand and include the date of the scheduled application, the identity of the pesticide to be applied by brand or common chemical name and precautions to be observed as printed on the pesticide product labeling or included in applicable laws or regulations.

3 CCR section 6600 defines "operator of the property" as a person who owns the property and/or is legally entitled to possess or use the property through terms of a lease, rental contract, trust, or other management arrangement. There is information in the record that John M. Growdon is the co-owner and president of Northern Star Mills (NSM), and that Mr. Growdon runs the day-to-day operations at NSM.

Mr. Cherubini stated at the hearing that he notified one employee from NSM of the initial intended date of the application, which was Tuesday, July 10, 2001. Mr. Cherubini stated that he was told by "an employee" of NSM, who was unnamed in the record, that Mr. Growdon was on vacation. Mr. Cherubini alleges that the same unnamed NSM employee failed to inform Mr. Growdon, because Mr. Growdon was on vacation. There is information in the record that Mr. Growdon was on vacation the first part of the week of July 9, 2001, but that Mr. Growdon was not out all week.

Mr. Cherubini stipulated at the hearing that he made an application of Conquer Residual Insecticide (Conquer) and mineral spirits, using a Micro-Gen mister. The mister was activated by a digital automatic timer. The application to control grain weevils was at NSM, a local feed store in Chico, California. The application automatically started in the evening of July 15, 2001.

Mr. Cherubini admitted during the hearing that he unilaterally and mistakenly set the automatic timer for Sunday evening, July 15, 2001, instead for the intended Saturday evening application on July 14, 2001. Mr. Cherubini also admitted that he did not inform the operator of the property that he had changed the date of the fogging application from the originally-planned date of Tuesday, July 10, 2001.

A reasonable inference from the information in the record is that Mr. Cherubini's Conquer application was made without proper notification to the operator of NSM in violation of section 6618(a)(1).

Civil Penalty

The appellant complains that "[A] \$1,000.00 fine (the maximum amount for this kind of violation) is excessively harsh given my attempts to notify Mr. Growdon or his employee and follow their instructions about never allowing the fogger to spray on weekdays on a repeating basis."

Under 3 CCR § 6130 county agricultural commissioners may levy a penalty of \$401 to \$1,000 for a serious violation. Serious violations include those that created an actual health or environmental hazard.

Six police officers from the Chico Police Department responded to a reported burglary at NSM at approximately 10:00 p.m. on July 15, 2001. Prior to entering the NSM building, the police dispatcher contacted Mr. Growdon. Since Mr. Growdon had not been notified by Mr. Cherubini that the timer had been set to activate on Sunday, July 15, 2001, Mr. Growdon did not alert the police to the potential exposure to the pesticide fog application. The officers entered the building at the same time the Conquer fogging application was underway.

The officers reported to their superiors that they were all beginning to cough and some of them were vomiting. They left the treated building after approximately ten minutes. After leaving the building and getting into the fresh air, five of the six officers were still coughing and some were vomiting. At least one of the officers could not stand up due to the effects of the exposure. The Chico Fire Department responded and treated the situation as a hazardous materials incident. The six pesticide-exposed officers removed their safety equipment and their uniforms, and were hosed down by the fire department to decontaminate them for transport to a hospital. The six officers were treated for pesticide exposure at the hospital. One officer was kept overnight for observation.

There is information in the record that the police officers' symptoms were consistent with the indications on the Conquer label and the material safety data sheet. There is information in the record that 39 work days were lost due to the officers' pesticide exposure. Seven other persons, including five other police officers, one community service officer, and one fire captain, were treated at the site for secondary exposure.

The appellant's violation of section 6618(a)(1) created an actual health hazard to the six police officers, and resulted in injury to the six officers. The fine of \$1,000 for the violation is not an excessive penalty.

Paul Cherubini
Docket No. 111
Page Four

Conclusion

The record shows the commissioner's decision is supported by substantial evidence, and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the total \$1,302 penalty.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

By: Original Signed by
Paul E. Helliker
Director

Dated: August 6, 2002